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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-708

THE NEWSPAPER GUILD, *Petitioner,*

v.

WICHITA EAGLE & BEACON PUBLISHING CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Newspaper Guild ("Guild") petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, *infra,* pp. 21-29) is reported at 480 F.2d 52. The Decision and Order of the National Labor Relations Board (A. 214-254, 259-60)[1] is reported at 199 N.L.R.B. No. 50 (1972). The Decision of the Labor Board in the underlying representation case (A. 178-183) is not reported.

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[1] "A" refers to the printed appendix in the Court of Appeals. A copy has been lodged with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1973. This Petitioner, The Newspaper Guild, was the charging party before the NLRB and the Court below granted its application for formal intervention on September 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). By order dated September 21, 1973, Mr. Justice White extended the time for the filing of this petition to and including October 30, 1973.

QUESTIONS PRESENTED

1. Whether the Labor Board properly determined that editorial writers, whose drafts of editorials are subject to review and approval by the publisher, are employees covered by the National Labor Relations Act and are entitled to protection against discrimination for union activity.

2. Whether the Court of Appeals improperly ruled that editorial writers are so closely aligned with a newspaper's management in the formulation, determination and effectuation of management's policies, as to be excluded from the protection of the Act.

3. Whether the Court of Appeals improperly rejected the Board's test for "managerial employees" based on a conflict of interest in labor relation matters, and adopted a novel test which has the effect of denying the protection of the Act to a large number of employees.

4. Whether the Court of Appeals improperly injected into the case the specter of an infringement of the newspaper's First Amendment rights, in conflict with *Associated Press* v. *N.L.R.B.,* 301 U.S. 103 (1937).

5. Whether the Court of Appeals violated the teachings of *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951), by rejecting findings by the Labor Board, a Regional Director, and a hearing examiner that editorial

writers were not managerial employees excluded from the protection of the Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra,* pp. 30-32.

STATEMENT

The Representation Proceedings Before the Board

The Guild began organizational efforts among the employees of the employer, the Wichita Eagle & Beacon Publishing Company, in the spring of 1970, and in August, 1970, filed a petition for certification of representative in a unit which included editorial writers Dorothy Wood and Theodore Blankenship. (Pet. App. 22; A. 215-6.) A hearing on the petition was conducted during which the employer contended *inter alia* that editorial writers were "managerial employees" and their inclusion in the unit would infringe upon the employer's First Amendment rights. (A. 183-187.)

The Regional Director of the Board thereafter ordered a representation election to be conducted in a unit which included the two editorial writers. (A. 178.) He held that "[t]here is nothing in the evidence to indicate . . . that [editorial writers] in any way, possess indicia of managerial employees." (A. 181.) The employer's Request for Review to the Board repeated its defenses on the editorial writers. (A. 187-193.) This Request was denied. (A. 193.)

The Guild won the representation election and was certified. In March, 1971, contract negotiations commenced and, as of this date, no agreement has been reached. (A. 217; 34-36; Pet. App. 22.)

The Unfair Labor Practice Proceedings

During the Guild's organizational activities, Ms. Wood joined the Guild and acted as a union observer at the rep-

resentation election. (A. 229, 34, 36.) Later, she was elected to the union's executive committee and to the union's negotiating committee. (A. 230, 35.)

As an editorial writer, Ms. Wood researched and drafted editorials. The following facts were found by the hearing examiner. No editorial "was published without prior submission to, and clearance by," the editor and publisher, John H. Colburn. (A. 219.) Editorials written by Ms. Wood were "initially subject to Pearson's [editor of the editorial page and acknowledged supervisor] scrutiny, review, and clearance, and [Ms. Wood was] subject to his direction and supervision." (*Ibid.*) Again, "[a]n editorial prepared by Wood . . . must have the approval of Pearson and Colburn before it is published, with Colburn having the ultimate determination." (A. 220.) "[N]o editorial is approved or published without Colburn's and Pearson's clearance and approval." (A. 221.)

A conference among the editorial writers, Mr. Pearson and Mr. Colburn usually preceded the drafting of the editorials. (A. 221-2.) Drafts were subject to further discussion and modification or rejection. (A. 222.) When a writing assignment was given, which the writer did not wish to accept because it was unpalatable to the writer, a request to be excused would be "customarily" honored. (*Ibid.*)

It was further found as fact by the hearing examiner that Ms. Wood had "no management role nor any other role distinguishing [her] from other employees," in regard to the relationship between her employer and the employees respecting wages, hours, and working conditions. (A. 219.) In this regard, the hearing examiner stated:

> In addition to having no management role or participation in employer-employee relations, there is no evidence or contention that Wood or Blankenship were participants in or privy to basic ownership and man-

agement policies in the area of profit and loss, capitalization, stock issuance, stock distribution or ownership, acquisition or disposition of real or other property or expansion or contention of that enterprise, or related management policy. Management policy or views that were expressed in editorials were determined by Colburn, the editor and publisher, or perhaps, ultimately, by the owners of the newspapers. (A. 220.)

Ms. Wood specialized on certain topics for editorials:

> To complete the foregoing picture of Wood as an editorial page employee of Respondent since February 1965, the type of subjects on which she customarily drafted editorials and her outside activities are relevant. She focused on urban topics and frequently wrote about schools and their problems. Welfare and women's rights were also within her ken. Labor-management matters were not her topic. Indeed, according to Wood's uncontroverted testimony, labor-management was an infrequent topic on Respondent's editorial page. (Footnote omitted.) (A. 224.)

Shortly after Ms. Wood joined the Guild, Mr. Pearson warned her that "the consequences were likely to be real severe." (A. 229, 37.) Mr. Pearson said her employer "would not like" her Guild association, and said she "should be prepared by any consequences." (A. 229, 37.) After the Guild's victory in the representation election, Mr. Colburn refused to include Ms. Wood in the customary editorial-staff conferences, while continuing them with Mr. Pearson and Mr. Blankenship.[2] When Ms. Wood questioned this, she was informed that Mr. Colburn did not want her in the Guild and had terminated the conferences with her for this reason. (A. 231, 31.) Later, in January or February, 1971,

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[2] Mr. Blankenship had not joined the Guild, and he testified before the Board that he opposed the Guild and did not think it was proper for him to join. (A. 229.)